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No.

IN THE

SUPREME COURT OF THE UNITED STATES

CAROLINA CASUALTY INSURANCE COMPANY,
Petitioner,

versus

TRANSPORT INDEMNITY COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This is a coverage dispute between insurers for a truck owner and an I.C.C. motor carrier who entered into a truck leasing arrangement regulated by the I.C.C. In this context the following questions are presented:

(I) Pursuant to I.C.C. regulations, a certificated motor carrier must obtain and file proof of surety conditioned to pay any final judgment against the motor carrier. Do these regulations require that a lessee motor carrier obtain insurance to provide coverage and a defense to owners and drivers of leased vehicles?

(II) Does the Interstate Commerce Act or related regulations require that the insurer for the lessee always assume primary responsibility for claims arising out of the use of a leased vehicle, regardless of the terms of the lessee's policy or the presence of a second insurer specifically insuring the vehicle, its owner and the driver whose negligence gave rise to the claims?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CAROLINA CASUALTY INSURANCE COMPANY,
Petitioner,

versus

TRANSPORT INDEMNITY COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPORTS OF OPINIONS

The order of the District Court has been submitted for publication, but no citation is yet available. The opinion of the Court of Appeals has not been reported.

SUMMARY OF ARGUMENT

Petitioner points to conflicting decisions of federal and state courts to justify a grant of certiorari in this case. Although a conflict exists, this is not the case in which to attempt a resolution.

In various cases and contexts courts have examined the impact of the Interstate Commerce Act and associated regulations on coverage disputes arising between insurance carriers for I.C.C. certificated carrier lessees and owner/operator lessors. As Petitioner points out in its argument, there are two lines of decisions reaching opposite conclusions on the question of whether the Act and regulations require that the insurance carrier for the I.C.C. certificated lessee always assume primary responsibility for claims arising from operation of the leased unit.

In the cases cited by Petitioner as being in conflict, two or more insurance companies had overlapping coverage. In this case, however, the courts below held that Respondent, unlike Petitioner, had no coverage as to the personal liability of the active tortfeasor driver, and on that basis granted judgment to Respondent.

The dispositive holding below was that Respondent's insurance policy did not expressly provide coverage to the driver and that neither the Interstate Commerce Act nor associated regulations required such coverage. This was the central issue in the case and the decision on this point is not in conflict with any decision of any court.

ARGUMENT AND REASONS FOR DENYING THE WRIT

There are no special or important reasons for granting the Petition herein. The decision rendered below is not in conflict with decisions of other courts, state or federal, on the dispositive issue presented. On the contrary, the result in the instant case is consistent with the reasoning of all other courts which have had occasion to address the question. Furthermore, the result in this case, to the extent it

involves a question of federal law, is consistent with the analysis applied by this Court in a prior case, and no important question of federal law is raised in this Petition which requires the attention of this Court at this time.

This case arises in the context of a trip lease under which the owner leased a vehicle, together with a driver, to a motor carrier holding an Interstate Commerce Commission certificate. The owner of the vehicle in this case had obtained insurance from Petitioner Carolina and the I.C.C. certificated motor carrier had obtained insurance from Respondent Transport. An accident occurred while the vehicle was being operated under the trip lease and the question arose whether Carolina or Transport would be required to assume primary responsibility to pay claims arising out of the negligence of the driver of the leased vehicle.

In order to receive a certificate from the Interstate Commerce Commission a motor carrier must establish to that body's satisfaction its ability to pay any final judgment rendered against it for injuries arising out of a unit operating under its certificate. 49 U.S.C. §315; 49 C.F.R. §1043.1(a). Additional regulations provide that a certificated carrier may lease units but in doing so must maintain responsibility and control over the operation of such leased units. 49 C.F.R. §1057.12(d). Insurance carriers for owners and/or operators, such as Petitioner herein, have argued that a lessee's insurance coverage is primary as a matter of law by virtue of these control and responsibility regulations and/or the financial responsibility regulations.

As Carolina points out in its argument, and as Judge Hawkins noted in his opinion below, decisions in this area have gone both ways. Carolina has accurately listed the

key cases in conflict and it would unduly prolong the length of this Brief to repeat that analysis. In rendering judgment for Transport, however, the district court in this case was not called upon to simply make a choice between two divergent points of view. This case presented an additional issue which was neither involved in the cases cited by Carolina to demonstrate the existence of a conflict, nor involved in any other reported federal decisions.

In all of the decisions cited by Carolina as being in conflict, courts were asked to decide which of two or more insurance companies providing coverage would be required to assume primary responsibility for claims arising out of the operation of leased units. This case is critically different inasmuch as the district court was presented with the threshold question of whether Transport provided coverage to the driver. The case turned upon this question because if Transport did not cover the driver it would eventually recover from Carolina by way of subrogation. Consequently, to avoid circuity of action, the district court held that Carolina should assume primary responsibility in the first instance. The question presented, as framed by Carolina, obscures this important distinction and for that reason Transport has offered its alternative.

The Transport policy has no omnibus clause, or any other provision which brought the driver or owner within the policy definition of "insured." In pertinent part, the insurance policy issued by Transport defined "insured" to include the named insured, the lessee motor carrier, and "...any other person...made so by any provision of law." There is no other policy provision which would bring either the vehicle owner or the negligent driver within the intended scope of coverage as set forth in the insurance contract. The dispositive holding of the district court was that no provision of law requires that the policy issued by

Transport extend coverage to the owner or driver. Thus, any payment made by Transport would have been on behalf of its named insured, the lessee motor carrier, which would have had a common law indemnity action available to it against its statutory employee, the negligent driver. *Seaboard Air Line Railroad Co. v. Coastal Distributing Co.*, 273 F.Supp. 343 (D.S.C. 1967); *Lankford v. Ryder Truck Systems, Inc.*, 41 F.R.D. 430, 431-432 (D.S.C. 1967); *Jenkins v. Southern Railway Co.*, 130 S.C. 180,189,125 S.E. 912 (1924). Since Transport would be subrogated to its insured's indemnity right against the negligent driver, in order to avoid circuity of action, Carolina, having specifically insured the owner, driver, and the vehicle involved, was held to have the primary obligation to defend and pay claims arising out of the negligence of the driver.

The conflicting decisions cited by Petitioner were reviewed by the district court solely to determine whether the Interstate Commerce Act, associated regulations, or public policy considerations read into the Transport policy an implied omnibus clause extending coverage to the personal liability of a driver of a vehicle leased to an I.C.C. carrier.

Upon reviewing applicable statutes, regulations, and decisions, Judge Hawkins held that the public policy involved was the protection of innocent members of the public from financially irresponsible truckers. He further held that public policy to be fully served by requiring the I.C.C. certificated carrier to obtain insurance against its own liability and that public policy did not require an I.C.C. carrier to obtain insurance to satisfy the personal liability of owners or operators of leased vehicles.

This result is consistent with decisions of various state

courts in analogous situations. *Transport Indemnity Company v. Teter*, 575 S.W.2d 780 (Mo. 1978); *Providence Washington Insurance Company of Alaska v. Alaska Pacific Assurance Company*, 603 P.2d 899 (Alas. 1979); *Kansas City Fire and Marine Insurance Company v. The Hartford Insurance Group*, 368 N.Y.S.2d 791, 82 Misc.2d 109 (1975); See also: *National Mutual Insurance Company v. Liberty Mutual Insurance Company*, 196 F.2d 597 (D.C. Cir. 1952).

The conclusion reached below on this issue is not only consistent with the above-cited authorities, it also is not known to conflict with any reported decisions, state or federal. At the very least, it can safely be said that neither Petitioner, Respondent, or the courts below have located any conflicting authority. Further, it is interesting to note the apparent view of the Tenth Circuit on this question. Of course, as noted in Carolina's Petition, among the federal circuit courts the Tenth stands as the sole support for the proposition that the lessee's insurance coverage is always primary. And even that court has refused to hold, in the face of an apparent opportunity to do so, that federal law requires that the driver be insured under the lessee's policy. *Carolina Casualty Insurance Company v. Transport Indemnity Company*, 488 F.2d 790 (10th Cir. 1973). There the Transport policy contained no omnibus coverage clause and the court noted that the driver was insured only under Carolina's policy. 488 F.2d at 794.

Finally, the result below is entirely consistent with the analysis employed by this Court in *Transamerican Freight Lines, Inc., v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975). Although *Brada Miller* is not directly applicable on its facts, both the result and analytical approach strongly support the conclusion that neither the Interstate Commerce Act, nor regulations issued thereunder,

nor implied notions of public policy require that the lessee obtain coverage protecting the driver or owner of a leased vehicle.

At issue in *Brada Miller* was a lease agreement which contained an indemnification clause whereby the lessor agreed to indemnify the lessee for claims arising out of the negligence of the lessor or its employees. When the lessee attempted to enforce the clause following its settlement of a claim, the lessor argued that the clause was unenforceable as against public policy because the control and responsibility regulations placed full responsibility on the lessee. This, of course, is strikingly similar to Carolina's arguments in this case that because of those same regulations the lessee's insurance carrier is always primary as a matter of law.

This Court reviewed the background of the rulemaking proceeding which resulted in the issuance of the control and responsibility regulations and noted that the Interstate Commerce Commission was concerned "...with that ultimate control in the lessee that makes and keeps it responsible to the public, the shipper, and the Commission." 423 U.S. at 39. The I.C.C. has not proscribed an arrangement which places ultimate responsibility on the party responsible in fact, "...so long as the lessee does not absolve itself from the duties to the public and to shippers imposed upon it by the Commission's regulations." *Id.* at 40. The Court concluded this phase of its opinion with the observation that "[a]lthough one party is required by law to have control and responsibility for conditions of the vehicle, and to bear the consequences of any negligence, the party responsible in law to the injured or damaged person may seek indemnity from the party responsible in fact." *Id.* at 40.

If the position of Carolina is acccpted, that the lessee and its insurance carrier are always primarily responsible, then the lessee or its insurance carrier could not seek indemnity from the party responsible in fact. Such a result is clearly inconsistent with the views of this Court as expressed in *Brada Miller*.

Of even more significance is the analysis employed in portion B of the opinion.

> The lessor, as a general rule, is the party more familiar with the equipment it leases and with the experience, ability, and record of the driver it furnishes. An agreement placing the ultimate financial responsibility upon the negligent lessor thus may have a tendency to provide greater protection to the public and to shippers. 423 U.S. at 41.

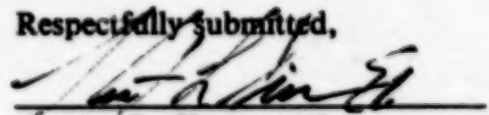
If Carolina's position is accepted, then the owner would know that so long as his equipment is leased to an I.C.C. carrier neither he nor his insurance company need respond to a claim for damages arising out of his or his employee's negligence. Can public policy or safety be promoted by a rule of law under which an owner/lessor would have no incentive to properly inspect or maintain his equipment, or to properly qualify and train his drivers? In light of these considerations, the so-called public policy arguments advanced by Carolina are somewhat less than compelling.

CONCLUSION

While there are certainly divergent decisions under myriad circumstances in this area of insurance law, this is not the case in which to attempt a resolution of all the various questions involved. In this case a federal court has for only the first time addressed the question of whether federal law requires an I.C.C. motor carrier to buy in-

surance which provides coverage as to the personal liability of owners and operators of units leased to the I.C.C. carrier. The result below is consistent with all the reported decisions on this point and an appropriate course would be to deny certiorari. This would provide an opportunity for the doctrines expressed below to develop and withstand the tests of time and further scrutiny.

Respectfully submitted,



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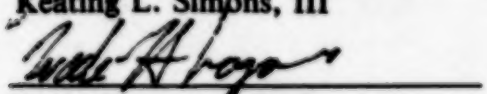

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CERTIFICATE OF SERVICE

I hereby certify that I am this date serving three (3) true and correct copies of Brief for Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, upon the persons and in the manner indicated below, said persons being counsel for all parties required to be served.

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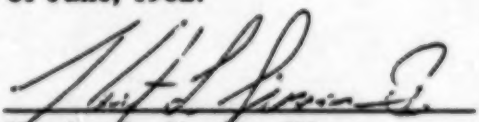

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